



**Director General Kenya School of Government Baringo Campus v Jebet (Chebet)
(Appeal E007 of 2021) [2024] KEELRC 143 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 143 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
APPEAL E007 OF 2021
DN NDERITU, J
FEBRUARY 8, 2024**

BETWEEN

**DIRECTOR GENERAL KENYA SCHOOL OF GOVERNMENT BARINGO
CAMPUS APPELLANT**

AND

JUNE JEBET (CHEBET) RESPONDENT

(Being an appeal from the judgement of the Senior Resident Magistrate (Hon Mr. B. B. Limo) delivered on 15th May, 2020, in Nakuru CMCC (ELRC) No. 109 of 2018)

JUDGMENT

I. Introduction

1. The Appellant herein was the respondent in the lower court in Nakuru CMCC (ELRC) No. 109 of 2018 which was commenced by the respondent herein (the claimant in the lower court) praying for the following –
 - a. Notice pay being one months salary of Kshs.15,824.90/-.
 - b. Compensation for wrongful termination being equivalent of 12 months' gross salary making it $Kshs.15,824.90 \times 120\% \times 12 = Kshs.227,878.56$
 - c. Unpaid leave days being $15,824.90/26 \times 1.75 \times 6 \text{ months} \times 4 \text{ years} = 26,780.60$.
 - d. Pro -rata leave for 6 months being $15,824.90/26 \times 1.75 \times 6 \text{ months} \times 4 \text{ years}$.
 - e. Leave travelling allowance to and from Narok being $Kshs.1,000 \times 2 \times 4 = 8,000/=$.
 - f. Unpaid national holidays being $Kshs.15,824.90/26 \times 2 \times 10 \times 4 \text{ years} = 48,692/=$.
 - g. Overtime worked (4 extra hours every Saturday)



Kshs.13,518.60/225 x 2 x 4 hours per week x 4 weeks per month x 8 months =Kshs.15,381 for the period April, 2017 – December, 2017.

Kshs.15,824.90/225 x 4 hours per week x 4 weeks per month x 9 months = 20,254.72 for the period January 2018 to September, 2018.

Sub -Total amount claimed = Kshs.388.375.08 plus

- h. Exemplary damages for reliefs (8) & (10) to be assessed by this Honourable Court.
2. The appellant defended the cause in the lower court and in a judgment delivered on 15th May, 2020 the learned trial magistrate found in favour of the respondent and declared that the termination of the respondent by the appellant was unfair and unlawful. The lower court entered judgment in favour of the respondent in the following terms –
1. The declaration that the respondent’s termination of the claimant’s employment was unfair. And for that 12 gross monthly salaries will serve ends of justice for the unlawful termination. Prayer b in the memo of claim succeeds or hereby granted.
 2. For prayer a-one month pay in lieu of termination notice;
 3. One month’s salary for unpaid annual leave for each year served.
 4. There is no evidence and none of plaintiff’s documents support the claims in respect to prayer d to g and I accordingly disallow the same.
 5. Claim for exemplary damages on account of disability. The court finds that the respondent did not dispute that the claimant had been certified to be a person with disability as per exhibit no 2.
- And since the court has made a finding that the termination of her employment was unfair and unlawful, her claim for exemplary damages succeeds. I shall award a sum of Kshs.300,000/ = under this limb.
- The claimant shall have costs of the suit and interest from the date of delivery of this judgment till payment in full.
- In compliance with Section 51 of the *Employment Act* Cap 226 Laws of Kenya, the respondents are hereby ordered to issue Certificate of Service to the claimant within 60 days form date of the judgment.
3. The appellant was dissatisfied with the findings and the judgment of the lower court and filed this appeal in the hope of overturning the same based on the following grounds as contained in a memorandum of appeal dated 2nd August, 2021 –
1. The learned magistrate erred in fact and law in awarding the claimant Exemplary damages based on wrong considerations.
 2. The learned magistrate erred in law and fact by failing to appreciate that the appellant’s witness was competent.
 3. The learned magistrate erred in law and fact by failing to appreciate that the Performance Appraisal Report for the claimant had been presented in court by a competent person authorized by the appellants.



4. The learned magistrate's decision was unfair as it was arrived at without proper appreciation of facts before court, relevant evidence and submissions of the Counsel for the Respondents by finding in favour of the Claimant herein.
 5. In all the circumstances of the case, the findings of the learned magistrate are insupportable in law or on the basis of evidence adduced.
4. The appellant prays that –
- a. The Appeal be allowed
 - b. The award of Kshs.594,565.40/= as damages be set aside.
 - c. The order made by the lower court as to interest be set aside
 - d. The Appellant be awarded the costs of this Appeal and in the Loser court.
5. The appeal is opposed and the respondent filed a cross-appeal but withdrew the same vide a notice dated 1st August, 2022. However, the respondent again filed another notice of cross-appeal dated 12th September, 2022 on even date. The cross-appeal is based on the following grounds –
1. That the Learned trial Magistrate made an error in law and in fact by holding that the claimant had not proved her case for other reliefs sought, thus erroneously dismissing her claim for pro-rata leave, travelling allowance, unpaid holidays and overtime.
 2. That the learned magistrate made an error in law and in fact by failing to consider the Appellant's own admission that the claimant worked on Saturdays and during public holidays, all of which was not paid for.
 3. That the learned trial magistrate erred in fact and in law by disregarding the claimant's authority supporting an award of Kshs.2,000,000/= as exemplary damages for violations of her rights as a person living with disability.
 4. That the learned trial magistrate erred in fact and in law for dismissing the claimant's claim for exemplary damages for being exposed to hazardous working environment.
 5. That the learned magistrate erred in law and in fact by failing to appreciate the evidence placed before him that shows the claimant had proved her entire case to the required standard.
 6. The respondent seeks for judgment in the following terms of the cross-appeal –
 - a. The award of Kshs.594,565/- granted be affirmed.
 - b. A further Kshs.144,670.90 be awarded for unpaid annual leave, pro-rata leave, leave travelling allowance, unpaid holidays and over time as particularized in the Memorandum of claim.
 - c. Exemplary damages for violations of the claimant's basic rights as a person with disability be enhanced to Kshs.2,000,000/= or to any other amount as will be assessed by this Honourable Court.
 - d. A declaration that the Respondents are exposing its Laundry workers to hazardous working environment and that a remedial measures be put in place immediately.
 - e. Exemplary damages for being exposed to hazardous working environment.
 - f. Certificate of service.



- g. Costs in High Court Miscellaneous Civil Application No. 109 of 2020 and ELRC Miscellaneous Application No. E11 of 2021.
 - h. Full costs in both courts and with interest at the rate of 14% from the date of filing the claim till payment in full.
 - i. Any other relief as the court may deem fit.
7. As it shall be analyzed below, the above cross-appeal was filed without leave of the court and way out of time.
8. When the appeal came up in court for directions on 1st February, 2023 it was, by consent, directed that the appeal be canvassed by way of written submissions. Counsel for the appellant, Miss Chepkirui, filed her written submissions on 7th March, 2023 and Miss Sabaya for the respondent filed on 29th March, 2023.

II. Submissions By Counsel

9. On the one hand, after laying the background of the appeal, counsel for the appellant condensed the grounds of appeal into two issues for determination by this court – Whether the trial court erred in law and fact in awarding the respondent exemplary damages based on wrong consideration, and, Whether the trial court erred in law in refusing and or failing to accept the performance report of the respondent as part of the appellants evidence.
10. On the first issue, it is submitted that the trial court failed to appreciate the principles and foundations upon which exemplary damages may be awarded. Counsel has cited *D K Njagi Marete v Teachers Service Commission* (2020) eKLR wherein the Court Appeal opined that if a court was to award more compensation than what is provided for under Section 49 of the *Employment Act* (the Act) it can only do so under special circumstances that may warrant such additional compensation. A claimant ought to adduce evidence demonstrating circumstances or reasons that may warrant such additional or extended award.
11. According to counsel, such circumstances or reasons for additional or extended award may include oppressive, unconstitutional, or arbitrary conduct, or where the conduct is calculated to earn or make a profit for the offending party. It is submitted that the respondent did not establish such reasons or circumstances as to deserve the award of Kshs.300,000/= in exemplary damages and, as such, it is submitted that the trial court erred in fact and law in making that award.
12. On the second issue, it is submitted that the learned trial magistrate erred in law when he disallowed the admission of the performance appraisal report of the respondent which was presented by the appellant through its human resources officer, Mr. James Oyugi, and insisted that the same ought to have been produced by the respondent's supervisor, the maker thereof.
13. It is submitted that the trial court contravened Section 125 of the *Evidence Act* by denying the witness stated above the opportunity of presenting and producing the said report yet he was a competent witness. According to counsel for the appellant, the said report was in the class of a public document that could be produced and admitted in evidence under Section 38 of the *Evidence Act*.
14. It is on the basis of the foregoing that counsel for the appellant prays that the appeal be allowed in terms of the orders sought in the memorandum of appeal as stated above.
15. On the other hand, counsel for the respondent identified the same issues for determination – Whether the trial court erred in law and fact in making the award of the exemplary damages; Whether the trial



court rightly rejected the performance appraisal report as presented in court by the appellant; and, Whether in consideration of the entire evidence and circumstances of the trial the court arrived at the right decision.

16. On the first issue, it is submitted that the award was based on a constitutional violation of the respondent's rights as a person living with a disability. Counsel has cited *Rookes v Bernard* (1964) AC 1129 alleging that the appellant, a government/public institution, discriminated against the respondent based on her condition of disability. It is alleged that the respondent was terminated on the basis of her low visual disability.
17. On the second issue, it is submitted that the trial court did not dismiss the evidence of Mr. James Oyugi but dismissed his production of the performance appraisal report as he was not the maker of the same and he gave no explanation as to why the maker of the report did not attend court. For that reason, it is submitted that the court rightly attached no probative value to the said report.
18. On the third issue, it is submitted that the trial court rightly found that the respondent had been terminated unfairly and unlawfully for she was denied both substantive and procedural fairness. It is submitted that the appellant did not comply with various provisions of the Act in terminating the respondent.
19. It is further submitted that the respondent was not consulted or involved in the performance appraisal which is against established principles and the law. Counsel has cited *Jane Wairimu Machira v Mugo Waweru & Associates* (2012) eKLR in support of that assertion.
20. It is submitted that if poor performance is the parameter that was applied in terminating the respondent, the appellant ought to have demonstrated that prior efforts had been made by the appellant towards improving the alleged poor performance before resorting to the termination. Counsel has cited, inter alia, *Jane Samba Mukala v Ol Tukai Lodge* (2013) eKLR and *Alois Makau Muluvu v Cititrust Kenya Limited & Another* (2018) eKLR in support of that argument.
21. It is submitted that the appellant resorted to summary dismissal contrary to the law and for that reason, among others, it is submitted that the cross-appeal be allowed and the exemplary damages be enhanced to Kshs.2,000,000/=. It is submitted that the award of Kshs.300,000/= by the trial court was inordinately low. Further, the respondent prays for Kshs.26,780/= in leave not taken for 11days, Kshs.25,563.30 in pro rata leave for six months, Kshs.8,000/= in leave travelling allowance, and Kshs.35,635/= in overtime.
22. Besides the enhanced exemplary damages of Kshs.2,000,000/= the respondent prays that an equal amount be awarded for exposure to hazardous working environment and the decision in *Faith Mutindi Kasyoki v Safepark Limited* (2019) eKLR is cited in support of that submission.
23. The respondent prays that the appellant be ordered to issue her with a certificate of service.
24. It is on the basis of the foregoing that the court is urged by the respondent to uphold and affirm the judgment of the lower court, dismiss this appeal with costs, and allow the cross-appeal as pleaded.

III. Issues for Determination

25. The court has carefully gone through the entire record of appeal and more particularly the memorandum of appeal, the memorandum in cross-appeal, the proceedings and the judgment of the lower trial court, and the respective written submissions by counsel for both parties. In my understanding of all the foregoing, in summary, the appellant is firstly complaining that the respondent did not prove her case during the trial and as such the trial court entered judgment in favour of



the respondent against the weight of the evidence adduced from both sides. Secondly, it is also the appellant's position that the respondent did not merit the awards made in the judgment, and in particular the award of exemplary damages in the sum of Kshs.300,000/=.

26. In my view, there are three broad issues for determination in this appeal, followed by the question of what orders this court should make, as follows –
- a. Is the cross-appeal properly before this court?
 - b. Based on the evidence adduced from both sides during the trial, was the termination of the respondent by the appellant unfair and unlawful?
 - c. Were the orders/awards made by the lower court lawful and justified?
 - d. Depending on the outcome of (a) and (b) above, what orders may this court issue?
 - e. Costs.

IV. Determination

27. This being a first appeal, this court has a duty and an obligation to re-examine, re-evaluate, and re-access the evidence, bearing in mind that it neither heard nor recorded the evidence at the trial – See *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
28. The evidence on record, as per the proceedings in the trial, is that the respondent, a person living with a disability and registered as such, was engaged by the appellant as a general labourer for the period from 1st September, 2014 to 4th September, 2018. She performed various tasks but was finally deployed in the housekeeping department.
29. The respondent's evidence in the trial was that she sought for and obtained three month's maternity leave from 1st June, 2018 but upon resuming duty on 4th September, 2018 she was served with a letter of termination with effect from 1st September, 2018. The reason for termination was stated as poor performance. Her appeal against the termination was dismissed and the termination confirmed.
30. The foregoing facts and evidence were not denied by the appellant during the trial but it insisted that the termination was lawful based on the respondent's poor performance and that the respondent was issued with an appropriate notice.
31. Upon conclusion of the trial, the trial court rendered the judgment as alluded to above which is now the subject of this appeal.
32. The court has suo motto raised the first issue for determination above for the following reasons. A cross-appeal is for all intents and purposes an appeal only that it runs counter to an appeal filed by the adverse party. The appellant commenced this appeal by way of a memorandum of appeal lodged in court on 3rd August, 2021, and on 10th August, 2021 the respondent lodged a cross-appeal vide a notice of cross-appeal dated 9th August, 2021. However, on 1st August, 2022 the respondent filed a notice of withdrawal of the cross-appeal effectively withdrawing the cross-appeal.
33. The appellant filed a record of appeal on 6th September, 2022 following orders of the court issued on 13th July, 2022 that the appeal and the cross-appeal be prepared for hearing within 60 days of the said ruling. It is important to note that it is after this order/direction that the respondent filed a notice of withdrawal of the cross-appeal vide the notice dated 1st August, 2022 filed in court even date.
34. There is nothing on record to indicate that an application was made at any time to reinstate the cross-appeal that was effectively withdrawn as above. There is also nothing on record to the effect that the



leave of the court was sought for and obtained for the respondent to file a cross-appeal out of time. In the circumstances, it is the finding and holding of this court that the cross-appeal was withdrawn as above and any submissions thereon by counsel for the respondent is misplaced, un-procedural, and irrelevant. After the withdrawal of the cross-appeal the respondent ought to have filed an application for reinstatement and or applied for leave to file the same out of time. That was not done and as such there is no cross-appeal properly and procedurally on record that may call for the attention of this court for consideration and determination. It is illustrative that counsel for the appellant did not submit on the so called cross-appeal as none existed. The court shall therefore proceed on the basis that there is no properly filed cross-appeal on record for determination by the court. That is the finding and holding in regard to the first issue.

35. On the second issue, although the respondent was allegedly engaged as a casual at the beginning of her employment relationship with the appellant, it is clear that she continued to work for the period from 1st September, 2014 to 4th September, 2018. It is the finding and holding of this court that the trial court was right in treating the employment relationship as contractual that could only be terminated in accordance with the law as provided for in Sections 35, 40 (in case of redundancy), 41, 43, 45 of the *Employment Act*, section 4 of the *Fair Administrative Action Act*, and Article 47 of the *Constitution*.
36. The jurisprudence on what constitutes (or does not constitute) unfair and unlawful termination is somehow settled and the same constitutes of substantive and procedural fairness – See *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
37. This court concurs with the trial court’s finding and holding that the termination of the respondent by the appellant was unfair and unlawful for many reasons. The respondent was not given a hearing and no disciplinary hearing was held. The respondent was not at all involved in the performance appraisal that allegedly found her such a poor performer that she had to be terminated. Counsel for the respondent has cited two leading decisions on how a performance appraisal should be carried out to the effect that before terminating an employee on the basis of poor performance an employer shall put in place measures to aid and help the employee to improve. The two leading decisions, *Jane Wairimu Machira v Mugo Waweru & Associates* (*Supra*) and *Jane Samba Mukala v Ol Tukai Lodge Limited* (*Supra*) are very clear and elaborate on this issue.
38. The court shall not dwell on the probative or evidential value of the performance appraisal report and whether the same was rightly or wrongly rejected by the court. Suffice to state here that the said appraisal report is not a public document within the meaning of Section 125 of the *Evidence Act* as alleged by counsel for the appellant. However, it is the finding and holding of this court that even if the said report was admitted in evidence it should not have altered the fact that the appraisal was conducted irregularly without any participation or input from the respondent. The respondent was terminated on the basis of the said report without being afforded an opportunity to defend herself on the same. That is the evidence on record and whether the said report was admitted or rejected in evidence the material facts and circumstances of this cause could have remained the same.
39. The court cannot therefore fault the finding by the trial court that the termination was unfair and unlawful and that holding is therefore upheld.
40. The next battlefield is the reliefs that the learned trial magistrate awarded. Of major concern is the exemplary damages awarded in the sum of Kshs.300,000/= allegedly on the basis that the respondent was discriminated based on her visual disability.



41. In fact, the appellant has not attacked the other awards except for the award on exemplary damages. However, the court shall comment on those awards as hereunder before tackling the elephant in the room – the awarded exemplary damages.
42. The court has concurred with the trial magistrate that the termination was unfair and unlawful both in substance and procedure and the reasons therefor have been articulated in an earlier part of this judgment.
43. The court finds and holds that the award of compensation equivalent to 12 months gross pay was neither punitive, excessive, unreasonable, nor unfounded. The appellant was ruthless, merciless, and inconsiderate in the manner it handled the disciplinary action against the respondent. The respondent had just resumed duty from maternity leave only to be met with a letter of termination following a performance evaluation process in which she was neither invited to participate nor made aware of. That was inhumane and degrading and unfair labour practice as envisaged under Article 41 of the Constitution.
44. Through this judgment, the court calls upon all employers to be considerate, fair, and just when dealing with their employees. The economy is in turmoil and each job lost has catastrophic effects, not only on the subject employee but also on her family and many other direct or indirect dependants. The respondent and her infant baby must have suffered terribly for this unfair and unlawful termination.
45. Considering the factors provided for under Section 49(4) of the Act the court holds that the award was fair in the circumstances and finds no reason to warrant interference with the same. Likewise, the court finds no reason to interfere with the award of one month's pay in lieu of notice and leave pay as the evidence adduced justified and supported the award.
46. On the award of the exemplary damages, the learned trial magistrate stated as follows – “Claim for exemplary damages on account of disability. The court finds that the respondent(appellant) did not dispute that the claimant had been certified to be a person with disability as per exhibit no. 2. And since the court has made a finding that the termination of her employment was unfair and unlawful, her claim for exemplary damages succeeds. I shall award as sum of Kshs.300,000/= under this limb.”
47. In the understanding of this court, the trial court was of the opinion that since the respondent (claimant) was a person living with a disability and certified as such, she was, of that fact alone, entitled to exemplary damages.
48. In the material part of the memorandum of claim in regard to this claim it is pleaded as follows “Exemplary damages for violations of her basic rights as a person with disability to be assessed by court.” There is no place in the memorandum of claim wherein it is pleaded that the respondent was discriminated against on the basis of her undisputed disability. There are no particulars of discrimination or violation of the rights of the respondent on the basis of her said disability. There is also no evidence of any prejudice, bias, disadvantage, discrimination, or any other unfavourable or unfair treatment that was meted upon the respondent on the basis of her disability.
49. In its relevant and applicable definition, the Black's Law Dictionary, Tenth Edition, defines discrimination as “Differential treatment; especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”
50. For the respondent to have deserved the award for damages for alleged violation of her rights as a person living with disability, she ought to have done the following in the minimum. One, she ought to have pleaded with specific particularity the alleged violations. Two, she ought to have tendered evidence



in proof of the said violations – See *Anarita Karimi Njeru v Republic (No. 1)* (1979) KLR 154 and *Mumo Matemu v Trusted Society of Human Rights Alliance* (2014) eKLR.

51. The respondent ought to have demonstrated that persons who were not disabled or those disabled or abled differently from her were treated in a preferential manner. Alternatively, she ought to have demonstrated that her termination was either directly or indirectly related or based on her disability.
52. With utmost and due respect to the respondent, it would appear that the only reason why the trial court awarded to her the exemplary damages is that she is a person living with a disability without the court establishing or backing the same with evidence that she had been discriminated against on the basis of her disability. Viewed from another hypothetical angle, if the respondent was a person without disability would she have been awarded the exemplary damages? The emphatic answer is no. It is for this very reason that the respondent ought to have proved that she was either directly or indirectly discriminated as the basis for her termination.
53. For all the foregoing reasons the court is of the considered view that the award of Kshs.300,000/= in exemplary damages was made by the trial court without proof of any discrimination or any other basis for such an award, and it was therefore made against the evidence adduced. The said award is hereby set aside.
54. As found and held in an earlier part of this judgment, the cross-appeal was formally withdrawn and the same was not reinstated or an application made for filing of the same out of time. The court shall therefore make no findings on the same. The notice of cross-appeal filed on 12th September, 2022 was filed without leave of the court and way out of time within which the same ought to have been filed.

V. Costs

55. The appeal has succeeded to a large extent. However, costs are at the discretion of the court. The court has noted that as per the supplementary record of appeal the High Court (Matheka J.) in Nakuru HC Misc. Application No. 109 of 2020 did not make an order on costs. This is an application that had been filed by the appellant seeking to be allowed to file an appeal out of time. In Nakuru ELRC Misc. Application No. E011 of 2021, the court (Wasilwa J.) ordered that the costs abide with the outcome of this appeal.
56. In the interest of justice and fairness the court orders that each party shall meet own costs for this appeal and the same order shall apply to the application and the order alluded to above (Wasilwa J.)
57. However, the respondent shall have costs for the trial in the lower court as ordered by the trial court.

VI. Orders

58. The court issues orders that -
 - a. The appeal shall succeed partially as hereunder.
 - b. The judgment of the lower trial court be and is hereby upheld, except in regard to the award of exemplary damages in the sum of Kshs.300,000/= which is hereby set aside.
 - c. Each party shall meet own costs in this appeal but the order of the lower court awarding costs of the trial to the respondent (claimant) is hereby upheld.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 8TH DAY OF FEBRUARY, 2024.

DAVID NDERITU



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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

